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No. 15

IN THE

Supreme Court of the United States

October Term, 1958

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

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APPELLANTS' BRIEF

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APPELLANTS' BRIEF

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Missouri, Eastern Division (R. 163) is reported at 153 F. Supp. 572. The report and order of the Interstate Commerce Commission in *Frisco Transportation Company Ext.—Joplin—Miami* (R. 593) set aside in large part by the court below,[1] appears at 62 M.C.C. 367.

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[1] The District Court held that the Commission validly restricted the certificate issued to appellee Frisco covering the Bennett operations. See footnote 2, p. 3.

JURISDICTION

The judgment of the lower court (R. 175) was entered August 9, 1957, with findings of fact and conclusions of law (R. 177) filed August 12, 1957. This court noted probable jurisdiction (R. 195) on February 3, 1958, 355 U.S. 938, 78 S. Ct. 425. Jurisdiction to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. § 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 5(2)(a) and (b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(a) and (b), are set forth verbatim in the appendix hereto.

QUESTIONS PRESENTED

The following questions, in the order of their importance in these appellants' view, are presented by this appeal:

1. Whether the Interstate Commerce Commission is empowered to authorize a railroad or its affiliate to perform unrestricted motor vehicle operations through the purchase of certificates theretofore issued to independent motor carriers?

2. Whether the Commission, after clearly indicating in the underlying finance proceedings that the rail subsidiary was to perform only auxiliary and supplemental motor operations, could, without further proceedings and without notice to the motor-carrier protestants involved, validly issue unrestricted certificates to Frisco?

3. Whether the District Court erred in holding that the certificates involved were not issued inadvertently by the Commission?

STATEMENT

Appellee, herein sometimes called Frisco, is a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company. The portions of its motor-carrier operating authority involved in this appeal were all acquired by purchase of rights previously held by independent motor carriers.

Each of the reports issued by the Commission, authorizing the purchase by Frisco of the rights theretofore held by independent motor carriers, contained a finding that the rights sought were needed "to afford applicant and the railway means for developing coordinated rail-truck service," or a substantially similar finding. In addition, the authority granted was specifically made subject "to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition."[2] As noted by Judge Moore, dissenting below (R. 173), Frisco did not exercise its right to petition for reconsideration of the reports and orders issued in the finance cases, but went ahead and consummated the purchases.

Despite the clear indication that the Commission had no intention of authorizing Frisco to engage in unrestricted motor operations, in all-out competition with independent motor carriers and, indeed, its own rail parent, the certificates ultimately issued to the rail subsidiary contained neither specific limitations upon the operating authority granted nor a reservation of the right to subsequently impose such restrictions.

Upon complaint by nine independent motor carriers, alleging that Frisco was operating illegally, the Com-

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[2] Frisco—Purchase—Cooper, 15 M.C.C. 317 (R. 639), Frisco—Purchase—Hamm, 15 M.C.C. 320 (R. 633), and Frisco—Purchase—Parker, 25 M.C.C. 96, also embracing the Tolson purchase (R. 624).

mission, division 5, held that Frisco's performance of unrestricted motor service "has been and is unauthorized and should be discontinued." In addition, the underlying finance reports were reopened "for the purpose of determining, what, if any, conditions or restrictions should be imposed in the certificates to remove all doubt about the character of operations which [Frisco] was authorized to acquire and in which it is authorized to engage." *Campbell Sixty-Six Express, Inc.* v. *Frisco Transp. Co.*, 43 M.C.C. 641, 653. Upon reconsideration, the entire Commission held that Frisco was not operating unlawfully, but it did so upon the narrow ground that it could "look only to the certificates held by [Frisco] to determine whether it is engaging in unauthorized operations." 46 M.C.C. 222, 225. The Commission went on to hold, however, that its finding that Frisco was operating lawfully was not to "be taken as an indication that the certificates now held by [Frisco] may not be corrected to reflect the intent of the finding in the acquisition proceedings or that restrictions may not be imposed now in some or all of the certificates held by [Frisco] which will have the effect of limiting the service thereunder to that which is auxiliary to or supplementary of the rail service of its parent company and preclude it from performing a direct and independent motor common carrier service." *Ibid.*, 225.

The original finance cases were reopened. On reconsideration and after oral argument, the Commission concluded, as had its Examiners (R. 528) and Division 5 (53 M.C.C. 415; R. 559), that the certificates issued to Frisco could not authorize unrestricted motor-carrier operations in view of the fact that the underlying finance reports, pursuant to which the certificates were issued, authorized the rail subsidiary to perform only a limited motor-vehicle service, coordinated with that of its parent railroad. The Commission further concluded that the certificates had been issued inadvertently, and that they should be

cancelled and corrected certificates issued, so restricted as to insure that the motor operations of the rail subsidiary would be confined to service auxiliary to or supplemental of that of its rail parent. *Frisco Transp. Co. Ext.—Joplin—Miami*, 62 M.C.C. 367; R. 593.

Frisco brought this action in the District Court on May 20, 1955, to set aside the Commission's report and order last referred to. The District Court, Judge Moore dissenting, found that the Commission had issued the unrestricted certificates intentionally and not as a result of clerical error, and that the Commission's order requiring cancellation of the outstanding certificates and substitution therefor of restricted certificates was without evidentiary support, and constituted an attempt, contrary to section 212 of the Interstate Commerce Act (49 U.S.C. § 312), to revoke and change a certificate duly issued.

SUMMARY OF ARGUMENT

These appellants contend that the Commission lacks power in a proceeding conducted pursuant to the provisions of Section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b), to authorize a railroad or its affiliate to perform motor-carrier operations completely unrelated to the train service of the railroad. If our contention is correct, the certificates received by appellee in these proceedings are null and void, and the question of whether they were issued as the result of clerical error by the Commission is rendered academic. Only last term this Court, in *American Trucking Associations, et al. v. U. S., et al.*, 355 U. S. 141, 78 S. Ct. 165, had occasion to deal with the Commission's power, under Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307, to issue unrestricted motor-carrier operating authority to railroads or their affiliates. In that case, this Court held that the Commission in a Section 207 case (involving extension of authority) was not governed by the "rigid requirements" of Section 5(2)(b) (involving purchase of

existing motor-carrier authority by railroads or their affiliates). The important difference, so far as the underlying statute is concerned, between that case and this is that here the "rigid requirements" of §5(2)(b) are directly applicable, unless they are simply to be read out of the statute. The decision of the court below does just that.

Assuming, *arguendo*, that the Commission is empowered, in a proper case, to authorize a railroad or rail affiliate to acquire, by purchase, rights to perform unrestricted motor operations, the Commission could not, in any event, have validly issued such authority to Frisco, considering the state of the record under consideration. The only formal proceedings conducted by the Commission (aside from those dealing with the question of whether the certificates were issued inadvertently) are the underlying finance cases.[3] In those cases the Commission's written reports, made after oral hearings, clearly informed all parties (including the independent motor carriers which had protested against the proposed purchases) that the rail affiliate was to perform only a restricted motor service limited to operations "auxiliary and supplemental" to the train service of its rail parent. There have been no further proceedings conducted by the Commission (and Frisco has never at any time sought such proceedings) to determine whether its original conclusion that Frisco should be limited to auxiliary and supplemental service should be reversed and unlimited motor-carrier service authorized. Appellee Frisco, while insisting that the Commission's action to correct the certificates to conform to the findings in the underlying finance cases is unfair to it and legally invalid, apparently sees nothing improper in the course of action which it claims the Commission followed, i. e., a change of mind completely outside the record as to the authority which Frisco should receive and the deliberate issuance

[3] See footnote 2.

of certificates authorizing the rail subsidiary to perform unrestricted motor service. Such a course of action, if followed, would constitute a flagrant violation of the rights of the independent motor carrier protestants in the underlying finance proceedings within the meaning of *Morgan* v. *U. S.*, 304 U.S. 1. These appellants are unwilling to accuse the Commission of such tactics, but prefer to assume the much more logical alternative—that the certificates issued by the Commission did not conform to the underlying finance reports solely as the result of clerical error.

ARGUMENT

The Commission Lacks Power to Issue Unrestricted Certificates to Railroads or Their Affiliates Under § 5(2)(b).

As this Court pointed out only recently in discussing the provisions of Section 5(2)(b) of the Interstate Commerce Act (formerly Section 213(a)(1) of the Motor Carrier Act of 1935), relating to acquisition of an existing motor carrier operation, "where a railroad or its affiliate is an applicant, the Congress directed the Commission 'not [to] enter such an order unless it finds that the transaction proposed' not only is in the public interest but 'will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.'" *American Trucking Associations, Inc.* v. *U. S., supra,* 355 U. S. 147, 78 S. Ct. 169. That case, unlike this one, dealt with an application by a rail subsidiary to perform motor service pursuant to § 207 of the Interstate Commerce Act. In that case, appellants contended that the provisions of § 5(2)(b), precluding the Commission from granting motor rights—other than so-called auxiliary and supplemental rights[4]—

[4] The term "auxiliary and supplemental" is not contained in the statute itself, but has been consistently used by the Commission in interpreting the Congressional mandate expressed in § 5(2)(b). Cf. *American Trucking Associations* case 355 U.S. 147-148, 78 S. Ct. 169.

to railroads or their affiliates, must be read into the provisions of § 207 whenever a railroad or its affiliate applied for operating authority under the latter section. This Court disagreed with appellants, saying (355 U.S. 150, 78 S. Ct. 171):

> We conclude, therefore, that the Congress did not intend the rigid requirement of § 5(2)(b) to be considered as a limitation on certificates issued under § 207.

The Court went on to hold however, at the same page of the opinion, that "the underlying policy of § 5(2)(b) must not be divorced from proceedings under § 207. * * * But for reasons we have stated we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding."

We should have thought the Court's decision in the cited case made two things clear: first, that the Commission is required to apply the policy underlying § 5(2)(b) even in § 207 cases except in the face of the exceptional circumstances found to be present in the proceeding there under consideration; second, that in a Section 5 case such as this the provisions of § 5(2)(b) are directly applicable and the Commission has no choice but to limit any grant of motor authority awarded a railroad or its affiliate to auxiliary and supplemental service. In addition to the clear and concise language of this Court's opinion in the cited case, this latter conclusion is further buttressed by Mr. Justice Frankfurter's dissent in *Schaffer Transportation Co.* v. *U. S.*, 355 U. S. 83, 93, 78 S. Ct. 173, 179, wherein he refers to the decision of the *American Trucking Associations, Inc.*, case as a "striking illustration of the difference between the limitation to which the Commission is subjected in a proceeding under § 5(2)(b) of the Interstate Commerce Act * * * and the requirements of section 207 of that Act, * * * although both relate to motor carrier service by railroads."

Although these appellants urged upon the court below, both on brief [5] and oral argument,[6] the contention that Congress had not empowered the Commission to allow railroads or their affiliates to institute unrestricted truck service by purchase of an existing motor operation, the opinion of the Court nowhere deals with the question.

We respectfully submit that the question of the Commission's power, or lack thereof, to authorize a railroad or its affiliate, through the medium of a purchase proceeding subject to the provisions of § 5(2)(b), to perform motor operations unrelated to those of the acquiring railroad, is the most important question presented in this proceeding. This Court's decision in the *American Trucking Associations* case clearly delimited the Commission's power under § 207 insofar as railroad motor operations are concerned; an additional interpretation by this Court of the Commission's power under § 5(2)(b) is needed, in order that the Commission, and the independent motor carriers and railroads subject to its jurisdiction, may have a clear understanding of the limits, if any, to its authority under that section of the law. Although we believe that the language of § 5(2)(b) makes it crystal clear that the Commission may not permit railroads to conduct all-out motor operations thereunder, the Com-

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[5] We quote a short portion of the section of our brief entitled "Limitations of Section 5(2)(b)" filed in the court below:

"It is apparent, therefore, that the only certificate that lawfully could be issued to the complainant and the only authority that was within the power of the Interstate Commerce Commission to confer upon consummation of the proposed purchase was for the rendition of service by motor vehicle by the complainant in connection with the rail operations of the parent railroad company. In other words, the Commission could only authorize the acquisition of motor-carrier rights insofar as they permitted complainant to render auxiliary and supplemental motor vehicle service, tied in with the operations of its parent railroad."

[6] R. 88-90.

mission, at the argument below, took the opposite position (R. 145):

> Judge Van Oosterhout: Of course, in a particular case, the Commission would have had power if the record justified it to issue an unrestricted certificate?
> Mr. Johns [Counsel for the Commission]: Now, we say yes; the ATA says no. * * *

We respectfully submit that a decision on the question of inadvertence, while of course important, will necessarily be limited to the facts of this particular case and thus have little precedent value. On the other hand, should the Court see fit to pass squarely on the question of the Commission's power under § 5(2)(b), that thorny problem in the Commission's administration of the Interstate Commerce Act will have been settled once and for all. We do not suggest that the Court not decide the question of inadvertence. Both questions are properly before it, and we see no reason why both should not be decided. But we recognize that the Court may, if it agrees with appellants, dispose of the case by either avenue. We therefore respectfully urge that should the Court decide not to deal with both questions, an interpretation of the Commission's authority under § 5(2)(b) can be expected to substantially reduce litigation before that body, as well as in the federal courts.

The Commission is currently processing purchase applications by railroads and their affiliates in a manner which we believe largely ignores the specific statutory provisions limiting its power in such cases. For example, in Docket No. MC-F-6643; *Burlington Truck Lines, Inc.—Purchase—Hobby,* the Commission's Division 4, in a report and order of August 6, 1958, authorized the wholly-owned subsidiary of the Chicago, Burlington & Quincy Railroad to acquire the operating rights of vendor, an independent motor carrier, without the imposition of any operating restrictions whatsoever. In Docket No.

MC-F-6688; *Santa Fe Trail Transp. Co.—Purchase—Payne,* Division 4, in a report and order dated July 30, 1958, authorized the wholly-owned subsidiary of the Atchison, Topeka and Santa Fe Railway to acquire the operating rights of the vendor, an independent motor carrier, with restrictions imposed as to some, *but not all,* the points authorized to be served. Again in Docket No. MC-F-6528; *Burlington Truck Lines, Inc.—Purchase—Love,*[7] the rail subsidiary was authorized to acquire the rights of the independent motor carrier vendor, by a report and order of Division 4, dated May 7, 1958, with operating restrictions applied to only a portion of the points authorized to be served. In view of the language of the proviso of § 5(2)(b), these appellants believe that the Commission should not even entertain a railroad application to perform unrestricted service through the purchase of existing motor operations. Yet it does so continually. For example, the Commission has scheduled a hearing for September 22, 1958, in Docket No. MC-F-6905; *New York Central Transport Co.—Purchase—Truck Transport Co.,* in which the wholly-owned subsidiary of the giant rail system seeks to acquire, with no restrictions whatever, the vendor's motor-carrier operating authority between points in the States of Michigan, Ohio, Illinois, Indiana, and New York, including such important commercial centers as Detroit, Pontiac and Flint, Michigan, Cincinnati, Toledo and Sandusky, Ohio, Indianapolis and Muncie, Indiana, and Waukegan, Ill.[7a]

We cite the cases referred to, and we could have cited more, solely to emphasize to the Court the great need for its interpretation of the Commission's power under § 5(2)(b), which we respectfully submit is currently being gravely misconstrued by that agency in contravention of the clearly expressed intent of Congress. In short,

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[7] Pending before the Commission on reconsideration.

[7a] The railroad and vendor have recently requested dismissal of the application.

though the Congressional policy expressed in the proviso of § 5(2)(b) is couched in clear language, the Commission stifles it by "a pedantic or grudging process of construction." *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 617, 64 S. Ct. 1215, 1221. Anticipating the contention that the Commission's failure to follow the express mandate of the proviso of § 5(2)(b) should be sanctioned as representing its "consistent construction," we can think of no better answer than this Court's own statement that "even consistent error is still error." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 678, fn. 5.

The Commission Could Not, In Any Event, Have Validly Issued Unrestricted Certificates to Frisco

This portion of our argument assumes that the Commission has power, despite the clear language of the proviso of § 5(2)(b), to issue unrestricted motor operating authority to railroads or their affiliates. Even so, we submit that the Commission could not, intentionally or otherwise, validly reverse its decisions in the underlying finance cases, outside the record and without notice to the motor-carrier protestants in those cases, respecting the authority to be conferred upon the rail subsidiary. Only Judge Moore, dissenting below, seems to have given this phase of the case any consideration:[8]

> I cannot see that Transportation Company's case would be any stronger if I were in fact persuaded that the omissions from the finance orders and certificates were intentional. I do not see how plaintiff could justify changes in the Commission's findings made without giving notice, or an opportunity to be heard to those appearing at the acquisition proceedings. 49 U.S.C.A. Sec. 305(a).

Here again, the majority below did not discuss this phase of the case in its opinion. We respectfully suggest that the majority became so engrossed with the

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[8] 153 F. Supp. 579; R. 173.

Watson case, which we later discuss and distinguish, that it somehow overlooked the fact that there were other, very live issues, vigorously urged on brief and in oral argument, in addition to the issue of inadvertence.

The majority below, in holding that the certificates were not issued inadvertently, seems to lean heavily on the fact that "intervening between the issuance of the finance report and the certificates in question, was the issuance by the Commission of compliance orders, which did not contain the limitation contained in the findings in the finance proceedings." 153 F. Supp. 576, R. 168. The majority seemed to feel that it is significant that "The action of the Commission in adopting the finance hearing report was not unanimous." *Ibid.*, R. 168-169.

Taking the latter point first, it is true that each of the decisions in the underlying finance cases[9] contains the bare notation "Commissioner Rogers dissents." The majority below apparently construed this as indicating that Commissioner Rogers favored a grant to Frisco of unrestricted authority. Such a construction, we submit, is shown to be erroneous by the very fact that Commissioner Rogers participated (as a member of Division 5) in one of the subsequent decisions dealing with the question of inadvertence,[10] and cast his vote, as did the other members of the division, in favor of revoking the outstanding certificates and reissuing them in conformance with the findings in the underlying finance cases.[11] This course of action hardly supports an assumption that Commissioner Rogers favored a grant of unrestricted operating authority to Frisco.

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[9] See footnote 2.

[10] Commissioner Rogers resigned from the Commission in April, 1952. The report of the entire Commission was not rendered until December, 1953. R. 593.

[11] 53 M.C.C. 415; R. 559.

We come next to the argument implicit in the decision of the majority below that the issuance of the unrestricted compliance orders, after the finance case decisions but prior to the issuance of the certificates, constituted notice that the Commission had reversed its intention, expressed in the original finance cases, to issue only limited authority to Frisco.[12]

Assuming, *arguendo,* that the issuance of the compliance orders did constitute notice of the Commission's intent to issue unrestricted certificates, the fact still remains that the motor-carrier protestants in the original finance cases were given no opportunity to be heard respecting the proposed change in the authority to be granted Frisco. Frisco's argument amounts to this: The Commission, after conducting open hearings and having reached one conclusion, expressed in its written reports, subsequently, through some form of "star chamber" process, reached an opposite conclusion which it first revealed by the issuance of the so-called compliance orders. Such a procedure would violate both the letter and the spirit of the law which the Commission administers. It should also be noted that the issuance of compliance orders is actually performed by clerical employees. Are we to assume also that the Commission somehow (again outside the record) conveyed to these subordinate employees its "change of heart" respecting the authority to be granted? The course of action attributed to the Commission by the majority below would, we submit, meet head-on with this Court's decision in *Morgan* v. *U. S.*, 304 U. S. 1, 18:

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportu-

[12] The opinion of the majority below does not so hold explicitly, but we believe we have fairly construed it in this respect. In addition, appellee specifically contends that the issuance of the compliance orders constituted "notice of the Commission's intention to issue unrestricted certificates." Appellee's Motion to Affirm, p. 16.

> nity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.

We submit that Judge Moore correctly sized up the situation in finding that the unrestricted certificates were issued due to the fact that "rail-affiliated motor carrier applications for authority * * * were a distinct minority of the total number of motor carrier service authorizations sought in the 'thirties and the 'forties; no doubt those charged with the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt." 153 F. Supp., 578-579, R. 173.

In its motion to affirm, appellee suggests that "the standard practice" was for any interested party who considered a so-called compliance order to be incorrect to "file a protest." The appellee continues: "It will thus be seen that the standard practice (followed here) provided for the very type of notice which appellants now claim was denied in this case." Motion to Affirm, pp. 15, 16. Such a strained construction overlooks the basic principles underlying the Interstate Commerce Act itself. In enacting that statute, Congress did far more than establish ground rules for the conduct of litigation between private parties. Considering the great public purpose underlying the statute itself and particularly the limits imposed on the Commission's authority by the proviso of § 5(2)(b), we submit it is idle to argue that the independent motor-carrier protestants in the original finance cases could have, even had they wished to, waived the right to protection from railroad monopoly written into the provisions of the statute governing rail acquisition of motor rights. This for the obvious reason that Congress limited rail acquisition of motor-carrier rights

primarily to protect the public; any benefit conferred upon their motor-carrier competitors is merely incidental.

Acceptance of appellee's contention would bring about a strange procedural result. Frisco had sought to acquire the motor operations involved in these proceedings from the independent motor carriers holding the franchises. The Commission's reports, approving the purchases, made it plain that appellee was to acquire only the right to perform motor operations coordinated with the train service of its rail parent. At this stage of the proceeding the burden was certainly on the rail affiliate, if it wished to secure unrestricted motor authority, to petition for reconsideration of the Commission's decisions in the finance cases. This it has not done to this day! Instead, it suggests that the burden of going forward with the case rested with the motor-carrier protestants when the compliance orders were issued. We believe the mere statement of the proposition demonstrates its absurdity.

Frisco's motion to affirm included as an appendix (p. 31) a copy of one of the so-called compliance orders, issued in connection with the *Hamm* purchase by Frisco. This is the Commission form which appellee claims constituted notice to the motor-carrier protestants that the Commission had changed its mind, since the form contains no specific restriction nor the reservation of the right to restrict Frisco's operations in the future. We submit that this is the most hypertechnical of arguments, which finds no support even in the language of the compliance order itself. The very first paragraph of the order states, in part: "It appearing * * * that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; * * *." Bearing in mind that Section 213 (now included in § 5) contains the very provisions which limit the Commission's power, when deal-

ing with an application by a railroad or its affiliate to acquire a motor carrier, to authorization of so-called auxiliary and supplemental motor service, it is entirely logical that a recipient of the compliance order would assume that the quoted language indicated the Commission's intention to ultimately issue a certificate in conformance with the restrictive language set forth in the cited section of the Act and adhered to in the Commission's reports in the underlying finance cases. This, we submit, is a far more plausible argument than that advanced by Frisco, particularly when it is kept in mind, as appellee admits, that independent motor carriers, prior to the issuance of the certificates, had challenged Frisco's right to conduct unrestricted motor operations.

The opinion of the majority below relies so heavily upon the *Watson* case (*Watson Bros. Transp. Co.* v. *U. S.*, 132 F. Supp. 905; aff'd. 350 U. S. 302) that we believe a brief discussion of that case is in order.

Watson, an independent motor carrier (unlike appellee here) filed application pursuant to § 206 of the Interstate Commerce Act to "fill out" its authority by extending its rights to haul explosives over all routes as to which it was certificated to transport general commodities; on sixty-nine of its eighty-four routes it already possessed authority to transport both categories of traffic. During the course of the hearing on the application, it developed that four government installations, not included in Watson's request for authority, and none more than a few miles off Watson's routes, had no motor carrier service whatever. 132 F. Supp. 906. When this became known, Watson's counsel moved to amend its application to include authority to serve the four installations, and counsel for protestants raised no objection provided that "[Watson's] counsel is agreeable to restricting the authority sought to service for the United States Government . . ." The examiner thereupon allowed the amend-

ment. *Ibid.*, 907. After some four years of operations, the Commission, without notice or hearing, issued an order purporting to correct its outstanding certificate. Under these circumstances, the District Court in the *Watson* case held that the Commission's action was invalid.

It thus becomes clear that whether Watson should have received a certificate authorizing only the transportation of explosives to the four installations (as contended by the Commission) or whether it was properly given authority to transport both explosives and general commodities, hardly constituted an important federal question worthy of full review by this Court. In the final analysis, Watson sought to render a complete service and the certificate issued authorized such service to the four government installations. Bearing in mind that protestants had no objection to broadening the application, so long as service to the United States Government was all that was sought, it seems obvious that had the all-inclusive certificate issued been "corrected" and revised to authorize only the transportation of explosives, Watson would simply have filed another application requesting general-commodity authority to the four points involved, which in all probability would have met little or no resistance.

We submit that *Watson* and this case are entirely dissimilar. First, in *Watson* the motor carirer was subject to no statutory disability as is the rail affiliate here. Second, Watson was given no notice or opportunity to be heard prior to the issuance of the order purporting to revoke its certificate; here, of course, Frisco was given notice, a full hearing, and the privilege of oral argument before the entire Commission. Finally, there was no specific indication in the original report (the examiner's report was ultimately adopted by the Commission) that Watson's authority to the four installations was to

be any different than the authority granted to the other points as to which Watson sought to render a complete service. Here again the rail affiliate, unlike Watson, knew from the very beginning that it was not to be given the right to conduct an all-out truck service. These differences, we submit, demonstrate the error of the majority below in relying upon *Watson* as precedent for the decision here under review.

CONCLUSION

For the reasons stated, it is submitted that the judgment of the court below should be reversed and the case remanded with instructions to dismiss the complaint, and for further proceedings consistent with this Court's opinion, and that this Court grant such further relief as it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 25th day of August, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Wayne H. Bigler, Esq., Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and by mailing copies in duly addressed envelopes, with postage prepaid, to The Solicitor General and Maurice A. Fitzgerald, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert Ginnane, Esq., its General Counsel, and to Charlie H. Johns, Jr., Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Frisco Transportation Company, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to its attorneys Ernest D. Grinnell, James L. Homire, John E. McCullough, and Alvin J. Baumann, Esqs., at 300 Frisco Bldg., 906 Olive Street, St. Louis, Mo., and with postage prepaid, to Bernard G. Ostmann, Esq., Transportation Bldg., Washington 6, D. C.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen of America, intervening defendants, by mailing a copy in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY

APPENDIX

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

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COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

Sec. 5. [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940 and August 2, 1949.*] [*49 U. S. C. § 5.*]

• • • •

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for

public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.